

# Strictly confidential

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I trust you. I'm sharing something with you, and by doing so I'm taking a risk. I can't control what you'll do with what I share. I don't know and I don't want to know. I don't need to know. We have a relationship with each other that makes it possible to bear not knowing. A relationship of confidence.

Relationships of confidence and what happens when several of them get into conflict with each other were the subject of a [decision by the German Federal Constitutional Court](#) that was published this week. The plaintiffs were three opposition groups in the *Bundestag* as well as several members of the parliamentary investigative committee on the so-called Amri affair: Anas Amri was the man who drove a truck into the Christmas market in Berlin in 2016, one of the worst terror attacks in Germany in ages, and the committee is tasked to find out what the security services knew or could or should have known about this man and his attack plans and could or should have done to prevent it. When it was reported in the press that the intelligence service had at least one source close to Amri – a so-called “V-Mann“, from *Vertrauen*, i.e. confidence – , the committee demanded information from the German government about who at the Office for the Protection of the Constitution was in charge of that confidant, so that it could hear the officers as witnesses.

The government refused to hand over that information, and according to the Federal Constitutional Court rightly so: among Islamists, the majority on the bench argues, “internal communication is characterized by a high degree of mistrust,” everyone smells traitors everywhere, and anyone who loses the trust of the group becomes an infidel, an enemy, and risks life, limb and freedom. Those willing to share information with the Office for the Protection of the Constitution therefore have a “need for unrestricted confidentiality.” If, however, their interlocutors testify as witnesses in a parliamentary investigative committee, even under the strictest secrecy, then it is “plausible” that the supposed confidants’ confidence suffers altogether, and not only the specific source, but also other potential sources would no longer be accessible at all. And that, according to the Senate majority, must never happen: The “guarantee of unrestricted confidentiality” has “a particularly high priority,” to which the “parliamentary interest in clarification” must be subordinate.

[BENJAMIN RUSTEBERG](#) has analyzed beautifully and in detail how this decision fits into the previous Karlsruhe case law and why it deserves to be criticized, and also put his finger on the point that doesn't stop itching me too: Who actually confides in whom here, and why?

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As is well known, confidence should be the basis of the relationship between the executive and the legislative branch in a functioning parliamentary democracy. The government enjoys the confidence of parliament, which means that parliament does not have to know everything it does. Parliamentary control doesn't mean micromanagement. There is a "core area of executive responsibility," as they say in Karlsruhe, which must remain free from parliamentary inquisitiveness. It's like a good marriage: You can tell it's good because the couple can afford not to always know everything about each other.

That, of course, applies only as long as neither part gives the other reason to become distrustful. If you're dropping love letters left and right, you shouldn't complain when your spouse starts inquiring somewhat urgently why you got home

so late last night. The German security services, when it comes to the handling of their *V-Männer*, have given plenty reason to distrust their innocence lately, in the trial against the nazi terrorist organisation NSU, before that in the failed party-ban trial against the rightwing extremist NPD. Whenever in recent years the floor plates of the domestic intelligence services have been lifted, a flurry and scramble came to light that should make even the most robust security politician feel sick to her stomach. And also in the Amri case at hand, the Federal Government has little reason to feign insulted innocence. After all, what is at stake here is nothing less than the suspicion that “out of consideration (for the endangerment of information sources) by authorities, especially of the federal government, measures against suspected participants in the attack were not taken” ([BT-Drucks. 19/943, II.6](#)).

However, it is not the “core area of executive responsibility” resulting from the principle of separation of powers that, in the view of the majority of the Karlsruhe bench, takes priority over the parliamentary investigation here, but the “interest of the state” (*Staatswohl*). This requires that a state secret remains a state secret and, in the opinion of the Senate majority, is where parliamentary investigation comes to a halt. The argument is not easy to understand, because the members of the investigative committee do not demand that the state disclose any secrets to the world at large – only to them, who as parliamentarians bear no less responsibility for the *Staatswohl* than any executive security officer. Especially since they don’t even ask for the name and address of the confidant, but merely want to hear from his commanding officer, in the utmost secrecy, what actually had been going on.

Remarkably, the only one on the bench who seems to be irritated by this is the one judge with many years of executive government experience, namely Peter Müller, formerly prime minister of Saarland, whose dissenting opinion very effectively plucks apart the argument of the majority: So the security authorities claim without further proof that their relationship with their sources relies on a “comprehensive promise of confidentiality”? So this is supposed to be a sufficiently compelling requirement of the *Staatswohl* to plunge an entire potential intelligence scandal, investigated in parliament, into the darkness of the state’s arcanum? So this takes per se priority over the parliament’s interest in being able to form an informed opinion about the terrible suspicion that the executive which it’s supposed to control may have chosen to serve the *Staatswohl* by failing to prevent one of the most terrible terrorist attacks in decades?

This is all rather unconvincing. And so we will have to keep living with the fact that the executive confides in their confidants, and vice versa. All of it, of course, strictly confidential.

## Open Access to Public Law

Last autumn, we submitted an application to the Federal Ministry of Education and Research for a project entitled “Open Access to Public Law”. It is about open access in legal research and the contribution that quality-secured multi-author blogs like us can make to advance it in the hitherto notoriously OA-sceptical German legal

academia. Now, we have been notified that our project will get funded. We start on 1 March.

What are our plans?

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First of all, we want to generate more knowledge about why open access in German legal scholarship has such troubles to get off the ground. To do this, we will organise an online symposium and, possibly in cooperation with others, conduct an exploratory interview study.

Secondly, we want to find out how we, as Verfassungsblog, have to position ourselves so that we can participate in the funding of OA publications. To this end,

we want to seek dialogue with academic institutions whose members publish with us. We want to establish a sustainable and transparent funding model for independent quality-secured multi-author blogs like us.

On this basis, we then want to test whether and how we can better fit into the existing OA landscape by developing further publication formats (overlay journal, edited volumes).

In order to cope with these tasks, we will be able to fill two positions from 1 March with the funds granted by the Ministry. For details, see [here](#).

## The week on Verfassungsblog

How can it be that, despite all the overwhelming evidence, the spectacle of violence at the EU's external borders keeps going on and on? [SABINE HESS](#) asks this question and sees the border not only as a redrawing of post-colonial Europe, but very fundamentally as a border of democracy.

The continuous attacks on the judiciary in **Poland** have shown that legal mechanisms offer only illusory protection. Why is it relatively easy for governments to subjugate the judiciary? Its fundamental weakness is its lack of connection to society. [FRANS VAN DIJK and KEES STERK](#) present a study to prove this point.

Meanwhile, Polish Justice Minister and Prosecutor General Zbigniew Ziobro announces that he will ask the PiS-subservient Constitutional Court to declare the **EU rule of law conditionality** incompatible with the Polish Constitution. [MACIEJ TABOROWSKI](#) shows why this makes little sense in terms of either European or Polish constitutional law.

Pressure is mounting on academic freedom in **Hungary**. With a reform programme launched in 2019, the government has begun to restructure universities from a state- to a privately-funded model. [TÍMEA DRINÓCZI](#) explains that while universities must apply for their own privatisation, the goal of the reform is nevertheless clear: to further curtail the independence of Hungarian universities.

At the beginning of January, one of **Latvia's** governing parties proposed to change the definition of "family" in the constitution. In doing so, it wants to "correct" a ruling of the Constitutional Court, which had included same-sex couples in the scope of constitutional protection of marriage. [KALVIS ENG#ZERS and MADARA ME#IKA](#) fear that the proposal and the campaign accompanying it could have far-reaching consequences.

On 25 January, a "panel of experts" ruled for the first time on violations of labour and social standards under the EU-South Korea Free Trade Agreement. There are no enforcement mechanisms, but [DUSTIN HESSE and ROMY KLIMKE](#) nevertheless see the decision as a bit of a milestone.

Recently, the **French** *Conseil Constitutionnel* published an important decision on the protection of the right to liberty during the sanitary state of emergency. [CATHERINE](#)

[HAGUENAU-MOIZARD](#) welcomes the decision that the extension of pre-trial detention without a judicial decision violates Article 66 of the Constitution.

In **Brazil**, the election of Kassio Nunes Marques as a Supreme Court judge in September 2020 was initially welcomed by many, as he had no known links to the government. Since then, however, Marques has shown great loyalty to Bolsonaro. This could play an important role in Brazil's future, as the judge is the likely deciding vote in a case to convict former President Lula da Silva, reports [CAMPBELL MACGILLIVRAY](#).

Farmers in **India** have been demonstrating against agricultural law reform for months. The Supreme Court has also had to deal with the matter. [LALIT CHENNAMANENI](#) explains why the court is – once again – failing to act as an effective counterweight to the government.

The first five decisions of the **Facebook Oversight Board** are public. [ORESTE POLLICINO and GIOVANNI DE GREGORIO](#) look at the board and its decisions from a constitutionalist perspective and examine the role the board plays in marginalising public institutions and public scrutiny.

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the Verfassungsblog team*

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**Corona vaccination** is being rolled out at last in Germany, but not everyone is getting her shot as quickly as she would like. A federal regulation is supposed to clarify the prioritisation issues, but it lacks a legal basis, according to [ANDREA KIESSLING, THORSTEN KINGREEN and ANNA LEISNER-EGENSPERGER](#). And this despite the fact that there has been no lack of warning from the legal community.

Meanwhile, a dispute has flared up with the EU Commission over AstraZeneca's vaccines, in which the pandemic and Brexit are mixed together in the most toxic way. [ARMIN VON BOGDANDY and PEDRO VILLARREAL](#) explain why any **vaccine nationalism** of the EU and the UK would be self-defeating for both and deplore the missed opportunity of a multinational solution.

Those who speak or decide about deprivation of liberty cannot remain silent about human dignity, says [CENGIZ BARSKANMAZ](#). Two decisions of the Federal

Constitutional Court, however, suggest that German courts do not always pay as much attention to the **human dignity of prisoners** as they should.

In Denmark, an ex-minister has to answer for misconduct in office because she declared the marriages of refugees who were still minors null and void, thereby causing an enormous amount of suffering. In Germany, the same thing has nominally been done by law since 2017, and whether this ban on **child marriage** is constitutional in its current form will be decided by the Federal Constitutional Court. [RALF MICHAELS](#) is quite sure that this well-meaning but badly crafted law will not stand.

In August 2020, the German Federal Labour Court upheld the order to pay compensation under Section 15 II 1 AGG. The state of Berlin had refused to employ a teacher who wore a **hijab**. For years, Berlin's education administration has thus disregarded the Federal Constitutional Court's case law. [WOLFGANG HECKER](#) finds that their arguments are in no way legally viable.

On Tuesday, the Federal Constitutional Court published a decision that was not actually about whether a law about **gender parity in the Bundestag** would be constitutional – there is no such law yet. Nevertheless, the Second Senate made some remarks which could be useful in the event that the legislators decide to enact one, as they almost read like a “how to”, finds [DANA-SOPHIA VALENTINER](#).

Will the far-right **AfD** party soon be observed in its entirety by the Federal Office for the Protection of the Constitution as a “case of suspicion”? The Cologne Administrative Court has provisionally rejected the AfD's urgent application against the office. [KLAUS FERDINAND GÄRDITZ](#) explains the substantive legal issues.

The latest reform of the German **Renewable Energy Sources Act** (EEG) came into force on 1 January 2021. [TRISTAN LEMKE](#) shows that it clandestinely introduces an unconstitutional levy with the financial participation of municipalities in the proceeds of wind energy.

So much for this once again extraordinarily eventful week.

As always, allow me to point out the possibility of making a financial contribution to the upkeep of Verfassungsblog: permanently here and as a one-off here.

Thank you for this and for your attention, and see you next week!

Max Steinbeis

